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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Opinion No. 11-IB1

January 6, 2012

REQUESTED BY:

Margaret M. McKay, Chair
Open Government
League of Women Voters of Delaware

and

John Flaherty, President
Delaware Coalition for Open Government

OPINION BY:

Kent Walker, Deputy Attorney General
Delaware Department of Justice

and

Lawrence W. Lewis, State Solicitor
Delaware Department of Justice

OPINION:

We received from you a complaint (the "Complaint") against the Capital School District (the "District") alleging certain violations of the Freedom of Information Act ("FOIA"), 29 *Del. C. Ch. 100*. By letter of October 17, 2011, the Complaint was referred by Deputy Attorney General Judy Oken Hodas to Mr. Phillip Martino, Jr., President of the Board of Education of the District (the "Board") for the District's response.

By letter dated October 28, 2011 to Ms. Hodas, the District responded to the Complaint through its attorney David H. Williams, Esquire.

THE COMPLAINT

The Complaint lists five numbered paragraphs, four of which allege specific violations of FOIA by the District:

1. Reference is made to the Board's lengthy, regular executive sessions, but no FOIA violation is alleged;
2. Failure of the District to identify in its posted agenda for its August 24, 2011 meeting the subject matter of an anticipated executive session (closed to the public);¹
3. Failure of the District to open its meeting in the auditorium where its public meeting was to take place and there to vote on entering into executive session, before it retired to the school library where it held its executive session;
4. Failure of the District to give proper prior notice of the addition of administrator salaries to its agenda for the public meeting on August 24, 2011; and
5. Failure of the District to reflect in its minutes for the meeting on August 24, 2011 its discussion of and vote upon the question of raising administrators' salaries.

ANALYSIS

1. Because no FOIA violation is alleged, no analysis is required.
2. We find that the District violated FOIA by not disclosing in its agenda for its August 24, 2011 meeting the reason for its proposed executive session. FOIA, 29 Del. C. § 10004(e)(2) requires that: "All public bodies [including school boards] shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda . . ." and § 10002(a) requires that the agenda include "a statement of intent to hold an executive session *and the specific ground or grounds therefor* . . ." [Emphasis supplied.] Lest there be any doubt of this requirement, § 10004(c) also requires that "[t]he purpose of such executive sessions shall be

¹ While the Complaint does not mention it, the District's revised agenda for its July 20, 2011 meeting and its agendas for its September 21, 2011, October 5, 2011, October 19, 2011, November 16, 2011, and December 7, 2011 meetings similarly say nothing whatsoever about the grounds for its anticipated "Closed Sessions" at those meetings.

set forth in the agenda . . .” The *agenda* for the District’s 2011 meetings on July 20, August 24, September 21, October 5, October 19, November 16, and December 7 gave no indication of the specific “ground or grounds” for the anticipated executive sessions.

The District, in its response to the Complaint, contends that its one page “Public Announcement” of the time and place of each of the proposed District Board meetings satisfied the agenda requirements because it declared that when the meeting began, the Board would immediately go into Executive Session for two to two and one-half hours “to discuss Personnel, Negotiations, and Litigation,” and then “return to Open Session.” But, as the District’s own documents indicate, the Public Announcement is not the “Agenda,” which, for each of the meetings on July 20, August 24 and September 21, was a separate, detailed listing of items for information, discussion and action by the Board at those meetings.

As this office has often opined, the intent of FOIA is not merely to encourage transparency in government, but require it. Just as the FOIA presumes that all government records are public and subject to disclosure, so too does it presume that all meetings of public bodies are open to the public, with narrow exceptions for non-public “executive sessions.” And when a public body proposes to conduct public business behind closed doors, the public is entitled to know *in advance* what that specific business will be.² Because the District failed to inform the public as FOIA requires, of the reasons for its anticipated executive sessions, not only at the August 24 meeting, but also at the July 20, September 21, October 5, October 19, November 16 and December 7 meetings, each of those omissions violated FOIA.

² *Att’y Gen. Opinion* 05-IB30 does *not* stand for the proposition cited in paragraph 2 of the District’s response that the mention in the Public Announcement of an executive session “to discuss Personnel, Negotiations, and Litigation” satisfies the agenda requirements of §§ 20002(a) and 20004(c). The only reference in that opinion to executive session is in a partial quotation of § 10004(e)(2).

3. We also conclude that the District violated FOIA, 29 *Del. C.* § 10004(e)(2) when it failed to give proper notice of the location of its September 21 public meeting. Although the District did post a “Public Announcement,” its terms were ambiguous and misleading. The Announcement declared that the Board “will meet for a Public Meeting [location not specified] and go into Executive Session . . . in the Library to discuss Personnel, Negotiations and Litigation. The Board will then *return* to the auditorium for the Public Session . . .” [Emphasis supplied.] While the Announcement does not specify where the Public Meeting will commence, the clear implication is that it will be in the auditorium, its normal public meeting place, not the school library, and that the Board will “return” to the auditorium at the conclusion of its lengthy executive session.
4. The District also violated FOIA by approving a five percent salary increase for District administrators without giving proper notice of its intent in its August 24 meeting agenda to discuss and act upon the salary increase. Accordingly, the Board’s vote approving the salary increase is invalid.

FOIA, § 10004(e)(2) provides: “All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, *at least 7 days in advance thereof*. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . . however, the agenda shall be subject to change to include additional items . . . which arise *at the time of the public body's meeting*.” [Emphasis supplied.]

Defined in FOIA § 10002(a) “‘Agenda’ shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting. . . .” Clearly, salary increases for administrators is a major issue to be included in the meeting’s agenda.

As this office has repeatedly observed: “An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, and so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997)).

The omission of this item from the agenda is not excused by the FOIA provision permitting posting of an agenda after the initial posting of the public notice, both because an agenda had already been posted and because *the item was not added to the agenda until the meeting had already begun*. Section 10004(e)(5) states: “When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth on the agenda.” Not only was this important item of business added to the meeting agenda after the meeting began, no reason was given for the delay in posting it.

Even if the discussion of a salary increase were a proper subject for an executive session, as counsel for the District correctly advised it was not, any vote or other action on an increase obviously had to be listed on the advance meeting agenda and had to take place in the public session. But the published agenda for the August 24 meeting gave no hint that administrative salaries would be discussed or voted upon. As the District’s response to the Complaint admits, the agenda for the August 24 was not amended until the meeting itself was convened, and no member of the public could have had any notice of this important item of District business *until after the public meeting began!*

Even when a public body has complied with the six-hour agenda-amending provision of § 10004, our Office has repeatedly opined that, when a public body does amend an agenda

for a public meeting after its initial posting, the public body has the burden to show both that: (1) the matter of public business came up unexpectedly after the initial posting; and (2) the matter requires the immediate attention of the public body and cannot be deferred to a later meeting whose posted agenda would provide at least seven days prior notice to the public.

Here, the matter of administrative raises did not come up unexpectedly, but was intended to be discussed during the Board's executive session. The District's legal counsel's advice that those administrative raises were not appropriate for an executive session does not make the issue "unexpected." Moreover, there is no claim by the District that the matter could not have been deferred to its next public meeting on September 23, for which proper notice could have been given.

5. Finally, we conclude that, contrary to the Complaint, the District's minutes of the August 24 meeting do properly disclose the votes of the individual Board members and, hence, do not violate FOIA, section 10004(f), which requires that:

Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon.

The Complaint allegation that the minutes of the August 24 meeting do not disclose any discussion of a motion to raise administrators' salaries is without merit because the FOIA does not require that discussions of public bodies be set forth in their minutes. *See*, for example, *Common Cause of Delaware v. Red Clay Consolidated School District*, C.A. No. 13798, 1995 WL 733401, at p.4 [*9] (Del. Ch., Dec. 5, 1995) (Balick, V.C.). As this office has observed: "There is no clearly implied statutory requirement to summarize the subjects

discussed with any degree of specificity in the minutes FOIA requires to be prepared and maintained. FOIA only requires the minutes to include: a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon 29 Delaware Code § 10004(f).” *Att’y Gen. Op.* 05-IB06, p. 6.

CONCLUSION

As we discussed above, the executive session at the Board meeting on August 24, 2011, as well as executive sessions at 2011 Board meetings on July 20, September 21, October 5, October 19, November 16 and December 7 were unlawfully convened because prior notice in the agendas for those meetings was not given as FOIA requires. Any meeting of a public entity is a public meeting whose minutes become public records subject to public disclosure, except only to the extent the public entity properly convenes an executive session. When, as here, the executive sessions were not properly convened, those sessions must be deemed public and their minutes made public. Since the Board may not have fully understood FOIA’s requirements for convening executive sessions, we will seek no remedy for those past meetings. In the future, however, the Board must give prior notice of executive sessions and clearly specify the ground or grounds for each such session and we will insist that executive sessions not convened in accordance with FOIA’s requirements are public meetings and their minutes must be made available to the public.

We also conclude that the District violated FOIA, 29 *Del .C.* § 10004(e)(2) when it failed to give proper notice of the location of its September 21 public meeting. We insist that notices and announcements of all public meeting clearly and unambiguously identify the venue where the public meeting will commence and where it will resumed after any executive session. We

caution the District that failure to give proper notice of the location and time of public meetings may call into question the validity any action taken at such a meeting.

Further, the District violated FOIA by approving a five percent salary increase for District administrators without giving proper prior notice of its intent in its August 24 meeting agenda to discuss and act upon the salary increase. Although we have concluded that the action of the Board granting the salary increase was invalid, we leave with the District, in the first instance, to suggest within twenty (20) days of receipt of this opinion how it will reconsider this important issue at a lawfully convened public hearing or recoup the funds already paid as a result of its illegal action on August 24. If the District determines in future to grant its administrators a valid salary increase, it may do so only after it gives proper prior notice in a Board meeting agenda and considers and votes upon the increase in a public meeting of the Board.

Finally, we conclude that the minutes of the August 24 meeting met FOIA requirements by clearly recording the votes of the individual Board members on the administrators' salary issue and that FOIA does not require the minutes to record any discussions of the Board.

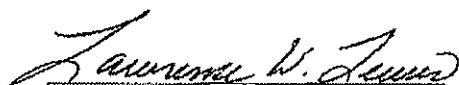
We reserve the right to pursue any remedies we may have under 29 *Del. C.* § 10005.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kent Walker", with a long, sweeping horizontal line extending to the right.

Kent Walker
Deputy Attorney General

Approved:

A handwritten signature in black ink, appearing to read "Lawrence W. Lewis", with a long, sweeping horizontal line extending to the right.

Lawrence W. Lewis
State Solicitor